statute. See *supra.* The decision in *Dunbar* v. *Dunbar, supra,* that a claim on a life annuity, conditioned on the annuitant remaining unmarried, was too contingent for proof, indicates that a contingent claim capable of estimation could be proved.

In a recent case the court overruled the defendant's plea of a discharge in bankruptcy in an action on a contract to purchase stock on or before a certain day. *Phenix Nat'l Bank* v. *Waterbury* (1908) 38 N. Y. Law Jour. 110. The contract did not create a debt since there could be nothing owing until the stock was tendered. See *Ames* v. *Moir* (1891) 138 U. S. 306. Nor did a debt arise on the contract because of bankruptcy since, conceding that the bankruptcy might be an anticipatory breach it is not so considered unless the party elects to recognize it as such. *Roehm* v. *Horst, supra.* It follows that since the party did not attempt to prove his claim, he did not make his claim provable and therefore was not barred in the subsequent action. The logic of this application of the doctrine of anticipatory breach to bankruptcy cannot be questioned, but it would not be surprising if the courts ultimately refused a creditor the option given him in the principal case.

CHATTEL MORTGAGES OF AFTER ACQUIRED PROPERTY.—Since "a man cannot grant or charge that which he hath not," Perk., 65, a chattel mortgage, operating as a present sale subject to a condition subsequent, is ineffectual in general to pass title to after acquired property, *Lunn* v. *Thornton* (1845) 1 C. B. 379; *Jones* v. *Richardson* (1845) 10 Met. 481; but see *American Cigar Co.* v. *Foster* (1877) 36 Mich. 368, subject to the exception that if the property has a potential existence, title passes, *Grantham* v. *Hawley* (1615) Hob. 132, a distinction the artificiality of which is illustrated by the irreconcilable diversity of the decisions in its application. Cf. *Briggs* v. *U. S.* (1891) 143 U. S. 346; *Rochester Distilling Co.* v. *Rasey* (1894) 142 N. Y. 570; *Comstock* v. *Scales* (1859) 7 Wis. 159; *Van Hoozer* v. *Cory* (1860) 34 Barb. 9. Any new act, however, when the property is acquired, sufficient to transfer title, brings it within the operation of the mortgage, Bacon, Max. R. 14, subject to the intervening rights of third parties; *Spinney* v. *Meloon* (N. H. 1907) 68 Atl. 410; thus, delivery by the mortgagor, *Stern* v. *Simpson* (1878) 62 Ala. 194, indorsement upon the mortgage, *Brown* v. *Thompson* (1871) 59 Me. 372, and, it would seem, the mere act of bringing the property upon the mortgagor's premises, if agreed to, see *Reeves* v. *Barlow* (1884) L. R. 12 Q. B. D. 436, though this result is hardly reconcilable with the broad statements in the earlier cases. Benj., Sales (5th Ed.) 129. So, also, if the mortgagee takes possession with the consent of the mortgagor, *Peabody* v. *Landon* (1888) 61 Vt. 318, or under a power to seize for that purpose, *Congreve* v. *Evetts* (1855) 10 Ex. 297; *Chase* v. *Denny* (1881) 130 Mass. 566, which power, coupled with an interest, *semble, Wood* v. *Leadbitter* (1845) 13 M. & W. 837, 846, would be irrevocable, see *McCaffrey* v. *Woodin* (1875) 65 N. Y. 459; contra, *Chynoweth* v. *Tenney* (1860) 10 Wis. 397, save by a discharge of the principal debt as in bankruptcy. *Thomson* v. *Cohen* (1872) L. R. 7 Q. B. 527. Seizure under the insecurity clause, *Francisco* v. *Ryan* (1896) 54 Oh. St. 307, or under the foreclosure clause, *Bennett* v. *Bailey* (1889) 150 Mass. 257; *Keating* v. *Han-*

nenkamp (1889) 100 Mo. 161, is also held sufficient. If the mortgagor of a stock of goods is empowered to sell but required to invest the proceeds in new stock, it is sometimes held by a fiction of agency that goods purchased with the proceeds of sales become the property of the mortgagee. *Allen* v. *Goodnow* (1880) 71 Me. 420. This doctrine has few adherents.

Various explanations have been given of the equitable jurisdiction of mortgages of after acquired property. Lord Westbury, making no distinction between a mortgage and an absolute sale, declared it an application of the doctrine of specific performance of a contract to sell, *Holroyd* v. *Marshall* (1861) 10 H. L. C. 191, but since equity will not enforce a contract to sell personalty not unique, this view is open to criticism. Pom. Eq. Juris. § 1288 n. 4. The maxim that equity regards as done that which ought to be done is considered by Lord MacNaghten the true explanation in a later English case, *Tailby* v. *The Official Receiver* (1888) 13 App. Cas. 523. but this is an explanation of the operation of equity, not of the primary consideration which gives rise to equitable interference. Pomeroy's *rationale,* that equity steps in to transfer a possibility not transferable at law, Pom., *supra,* § 1288, is given color by several early cases, *Wright* v. *Wright* (1750) 1 Ves. 409, but finds no support in the later cases. Any one of these theories applies equally well to every absolute sale, and though this result is favored by numerous dicta and a few isolated cases, *Brown* v. *Bateman* (1867) L. R. 2 C. P. 272; *McDonald* v. *McDonald* (N. C. 1859) 5 Jones Eq. 211, it seems inconsistent to enforce a sale of after acquired personalty and to refuse enforcement of an executory sale of specific property already owned. From this standpoint, Prof. Williston's view that the mortgage is specifically enforced on account of its uniqueness, security against insolvency, is plausible, though historically inaccurate. Whatever be the true explanation, it is well settled that an equitable lien attaches to the property when acquired, *Holroyd* v. *Marshall, supra; Pennock* v. *Coe* (U. S. 1859) 23 How. 117; *Smithhurst* v. *Edmunds* (1862) 14 N. J. Eq. 408; contra, *Moody* v. *Wright* (Mass. 1847) 13 Met. 17, following a dictum of Parke, B., in *Mogg* v. *Baker* (1838) 3 M. & W. 194; *Chynoweth* v. *Tenny, supra,* which is enforcible against all third parties but a purchaser for value without notice. *Mitchell* v. *Winslow* (Fed. 1843) 2 Story 630; *Ludlum* v. *Rothschild* (1889) 41 Minn. 218; contra, *Rochester Distilling Co.* v. *Rasey, supra,* and *Zartman* v. *First Nat'l Bk.* (N. Y. 1907) 82 N. E. 127, giving a lien against the mortgagor only.

The application of the foregoing principles is frequently limited by other considerations. If the mortgagor of a stock of goods is empowered to sell, a majority of States, 6 Cyc. 1104-1120, following the New York rule, *Edgell* v. *Hart* (1853) 9 N. Y. 213, established during the controversy over Twyne's Case, *Divver* v. *McLaughlin* (1829) 2 Wend. 596, on the strength of an early English *nisi prius* decision, *Paget* v. *Perchard* (1794) 1 Esp. 205, consider the mortgage void against creditors for fraud, with the subsequent modification that if the profits are to be applied to the mortgage debt the presumption of fraud may be rebutted by evidence of good faith. *Brackett* v. *Harvey* (1883) 91 N. Y. 214; *Edelhoff* v. *Horner etc. Mfg. Co.* (1897) 86 Md. 595; contra, *Deering* v. *Washbourne* (1891) 141 Ill. 153. England and some states hold fraud a question of fact in all cases. *Ex parte Games*

(1879) 12 Ch. Div. 314; *Fletcher* v. *Powers* (1881) 131 Mass. 333; 6 Cyc., *supra.* The two doctrines are ultimately based upon diverse views of public policy. The usual argument for the New York doctrine that the arrangement induces a false credit, is equally applicable if the profits are to be applied to the mortgage debt, and loses force where recording gives notice. The objection that a mortgagor is authorized to sell out in defraud of creditors, exists only where there is no obligation to maintain the stock. Delay of general creditors follows any mortgage regardless of the power of sale. On the other side is the cogent argument that discontinuance of business, often the only alternative, is economically undesirable and harmful to creditors. *Etheridge* v. *Sperry* (1890) 139 U. S. 266, 277. If the mortgagor is bound to keep up stock, though authorized to enjoy the profits, there seems no reason for a conclusive presumption of fraud. *Briggs* v. *Parkman* (Mass. 1841) 2 Met. 258; contra, *Gallagher* v. *Rosenfield* (1891) 47 Minn. 507.

This view was rejected in the recent case of *Madson* v. *Rutten* (N. D. 1907) 113 N. W. 872, where, under a mortgage of this type, the mortgagee seized upon default after acquired property and sold on foreclosure to an innocent purchaser for value. The act of the mortgagee was sufficient in general to transfer title, *supra,* but, the mortgage being void for constructive fraud, no subsequent act done by the mortgagee under its authority could validate it against attaching creditors. *Mandeville* v. *Avery* (1891) 124 N. Y. 376; *Blakeslee* v. *Rossman* (1877) 43 Wis. 116; contra, *Read* v. *Wilson* (1859) 22 Ill. 376; *Barton* v. *Sitlington* (1895) 128 Mo. 164. A new transfer by the mortgagor in disregard of the prior mortgage would alone protect the mortgagee. *First Nat'l Bank etc.* v. *Enderson* (1878) 24 Minn. 435. The defendant, however, as a *bona fide* purchaser took good title on the well settled principle of fraudulent conveyances that a *bona fide* purchaser from the grantee is protected against creditors of the grantor. Bump, Fraud. Con. (4th Ed.) ch. 17.

SPECIFIC PERFORMANCE WITH COMPENSATION.—At law a vendor of land would be nonsuited were he to attempt to enforce a contract which he was unable to perform on his part. Where the failure of performance as to quality, *Drewe* v. *Corporation* (1804) 9 Ves. 368, or quantity, *Calcraft* v. *Roebeck* (1790) 1 Ves. Jr. 221; *Foley* v. *Crow* (1872) 37 Md. 51, is unsubstantial, equity will hear the vendor's suit since chancery, looking to the substance, Batten, Spec. Perf. 122; *Dyer* v. *Hargrave* (1805) 10 Ves. 505, and holding it unconscionable to take advantage of trivialities, *Stewart* v. *Alliston* (1815) 1 Mer. 25, will not permit the forms of law to be instruments of injustice. *Halsey* v. *Grant* (1806) 13 Ves. 73. Compensation is given as incidental, *Beyer* v. *Marks* (N. Y. 1870) 2 Sweeney 715, to complete the equitable relief and avoid circuity of action. *Erwin* v. *Meyer* (1863) 46 Pa. St. 96. This relief will be refused, however, unless two conditions are present: *Guynet* v. *Mantel* (N. Y. 1854) 4 Duer 86; *Beyer* v. *Marks, supra:* first, the defect must be immaterial; secondly, it must be measurable in money. The former is based on the consideration that equity will not enforce a contract never intended: were the defect material, the vendee probably would not have entered into the agreement. *Thomas*